ORAL ARGUMENT SCHEDULED FOR MARCH 7, 2003

No. 01-7197

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROGER W. MEHLE,
as managing fiduciary of the Thrift Savings Fund,
a Federal trust fund, and on its behalf,
Plaintiff-Appellant,

v.

AMERICAN MANAGEMENT SYSTEMS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the District of Columbia

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BRIEF OF *AMICI CURIAE* FOR APPELLANT VINCENT R. SOMBROTTO, *ET AL.*

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This case has been scheduled for oral argument on March 7, 2003.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici - All parties, intervenors and *amici* who appeared before the district court and are appearing in this Court are listed in the Brief for Appellant.

(B) Ruling Under Review - References to the ruling at issue appear in the Brief for Appellant.

(C) Related Cases - As far as *Amici* are aware, this case has not previously been before this Court, and there are no related cases pending before this Court or any other court. After this suit had been filed in the district court, Defendant-Appellee brought suit against the United States in United States Court of Federal Claims, *American Managements Systems, Inc. v. United States*, 01-586C, based on the same contract at issue in this case.

DISCLOSURE STATEMENT

Amici curiae are individuals who are representatives of unions and professional associations of federal and postal employees and retirees. None of the *amici* or the organizations they represent has a parent company nor does any publicly held company have a 10% or greater ownership interest in any of them.

TABLE OF AUTHORITIES*

Cases

Statutes And Rules

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*There are no authorities on which the brief principally relies.

Legislative Materials

GLOSSARY

AMS	American Management Systems, Inc.
DOJ	Department of Justice
ERISA	Employee Retirement Income Security Act
FERSA	Federal Employees Retirement System Act
Fund	Thrift Savings Fund

STATUTES AND REGULATIONS

The text of relevant statutes and regulations are set forth in the Addendum to this brief.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY FOR BRIEF

The *amici curiae* on this brief are representatives of organizations - including unions and associations of federal and postal employees and retirees - whose memberships include participants in the Thrift Savings Fund ("the Fund").[1] In fact, the members of the represented organizations constitute the vast majority of

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[1]They are Vincent R. Sombrotto, President of the National Association of Letter Carriers; Robert L. Tunstall, Secretary-Treasurer of the American Postal Workers Union; Colleen M. Kelley, President of the National Treasury Employees Union; Richard N. Brown, President of the National Federation of Federal Employees; Clifford D. Dailing, Secretary-Treasurer of the National Rural Letter Carriers Association; Walter M. Olihovik, National President of the National Association of Postmasters of the United States; Joseph W. Cinadr, President of the National League of Postmasters of the United States; Ted Keating, Executive Vice President of the National Association of Postal Supervisors; Michael B. Styles, President of the Federal Managers Association; Charles Fallis, National Treasurer of the National Association of Retired Federal Employees; Freda Kurtz, Past President of Federally Employed Women; Sandra Sue Adams-Choate, Assistant General Counsel – Legislation, for the American Federation of Government Employees, and Gary A. Edwards of the National Association of Government Employees.

A motion is currently pending for leave to add John K. Naland, the President of the American Foreign Service Association, as an additional *amicus curiae.* If granted, he should be deemed as a party to this brief.

Richard L. Strombotne of the Senior Executives Association had been granted leave to participate in the brief but has chosen to withdraw as an *amicus curiae* for Appellant.

the approximately 2.5 million civilian participants in the Fund. Accordingly, each *amicus curiae* has an interest in the Fund recouping the money lost as a result of the fraud and breach-of-contract committed by Defendant-Appellee American Management Systems, Inc. ("AMS"). More broadly, each *amicus curiae* has an interest in the legal principle at stake in this case, namely, that the Fund's Executive Director be acknowledged to have authority to bring suit on behalf of the Fund to protect it and the savings of its millions of participants.

The Court's order of February 27, 2002 authorized the filing of this brief.

SUMMARY OF ARGUMENT

By holding that the U.S. Department of Justice ("the DOJ") has exclusive control over litigation of the Fund's claims against AMS, the court below acted contrary to the intent of Congress. In enacting the Federal Employees Retirement System Act ("FERSA"), Congress made every effort to shield the administration of the Fund and the Fund's assets from political influence and manipulation. The DOJ acts according to the dictates of the Administration and is necessarily subject to political influence. Giving the DOJ exclusive control over a legal claim by the Fund undermines Congress' plan to shield the Fund from politics.

In addition, since the Fund is an employee savings plan, the money at stake in this case is not government money, but money that belongs to the employees who participate in the Fund. Accordingly, only the Executive Director, as trustee of the Fund, should have authority over the Fund's claims against AMS. The DOJ should have no say, let alone exclusive say, in the litigation.

Basic trust law, as well as the broad statutory power that FERSA vests in the Executive Director, clearly authorize the instant lawsuit. And the legislative intent behind FERSA confirms that the Executive Director, not the DOJ, has litigation authority.

ARGUMENT

I. THE DISTRICT COURT DECISION CONTRAVENES CONGRESS' INTENT TO SHIELD THE ASSETS OF THE FUND FROM POLITICAL CONTROL

A. Congress Designed FERSA To Shield Fund Administration From Political Influence

As the conference report on the FERSA bill notes, during the legislative process that led to passage of the act, "[a] great deal of concern was raised about the possibility of political manipulation" of the Fund. H.R. Conf. Rep. No. 99-606, at 136 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1508, 1519. For example, one witness during the committee hearings warned that "political and financial manipulation [of the Fund] would be a constant threat. Safeguards against

such manipulation could never be made strong enough." *Hearings Before the House Comm. on Post Office and Civil Serv.*, 99th Cong. 151 (October 1985) (Serial No. 99-30) ("*Oct. 1985 House Hearings*") (statement of James Pierce, President, Nat'l Fed'n of Fed. Employees). Another witness warned that careful attention would need to be given "to assure that the [Fund] is perform[ing] objectively, fairly, and without partisan bias." *Hearings Before the House Comm. on Post Office and Civil Service*, 99th Cong. 292 (April 1985) (Serial No. 99-2) (statement of Jerry Shaw, Jr., general counsel of the Senior Executives Ass'n). Indeed, the conference report indicates that the conferees spent more time on "[c]oncerns over the specter of political involvement in the thrift plan management," Conf. Rep. No. 99-606, at 136, 1986 U.S.C.C.A.N. at 1519, than on any other matter. *Id*. at 137, 1986 U.S.C.C.A.N. at 1520.

These concerns focused on two issues: (1) that the Fund's Board, composed of Presidential appointees, might be susceptible to pressure from the Administration, and (2) that "Congress might be tempted to use the large pool of thrift money for political purposes." *Id.* at 136, 1986 U.S.C.C.A.N. at 1519.

Congress designed the statute to preclude either possibility. *Id*. First, it imposed upon the fiduciaries of the Fund the same exacting standard of conduct that the Employee Retirement Income Security Act ("ERISA") requires of private-sector pension plan trustees. *See* S. Rep. No. 99-166, at 19, 72 (1985), *reprinted in*

1986 U.S.C.C.A.N. 1405, 1424, 1477; 131 Cong. Rec. S15035 (daily ed. Nov. 7, 1985) (statement of Sen. Stevens); *see also* Conf. Rep. 99-606, at 136, 1986 U.S.C.C.A.N. at 1519 ("The Board members and employees are subject to strict fiduciary rules.") In particular, FERSA requires that a fiduciary

> shall discharge his responsibilities with respect to the Thrift Savings Fund ... solely in the interest of the participants and beneficiaries and ... (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the Thrift Savings Fund ....

5 U.S.C. §8477(b)(1)(A).

Second, Congress gave the Fund's Executive Director broad authority to manage the Fund while insulating him from outside political interference. Congress provided that the Fund's Board would determine matters of Fund policy, *see* 5 U.S.C. §8472(f)(1); S. Rep. 99-166, at 20, 1986 U.S.C.C.A.N. at 1425 (the Board "will set the overall policy" for the Fund), but it left the day-to-day administration of the Fund to the Executive Director, *see id*. §8474(b); S. Rep. 99-166, at 20, 1986 U.S.C.C.A.N. at 1425 (Executive Director "will manage the thrift plan."); *id*. at 74, 1986 U.S.C.C.A.N. at 1479 (Executive Director "to be the primary manager of the Thrift Plan."); 131 Cong. Rec. S15035 (daily ed. Nov. 7, 1985) (statement of Sen. Stevens).

Congress barred the Board, whose members are appointed by the President and thus susceptible to political influence, from interfering with the administrative decisions of the Executive Director. As the Senate Report explained,

> The Board is prohibited from directing the Executive Director to make specific investments or contracts. The committee believes the political accountability of the Board members is important to ensure that the intent of the law is carried out. On the other hand, the committee intends that investment decisions be made *totally independent of the Board members and possible political pressures*.

S. Rep. No. 99-166, at 20, 1986 U.S.C.C.A.N. at 1425 (emphasis added); *see also Hearing on S. 1527 Before the Senate Comm. on Governmental Affairs* ("*Sen. Hearings*"), 99th Cong. 115 (1985) (statement of Jon Fossel, senior vice president and director, Alliance Capital Mgmt. Corp.) (noting that it is "paramount" that the executive director be as far removed from political influences as possible).

To further insulate the Executive Director from the Board and political influence, Congress made the Executive Director removable only for good cause shown, upon a vote of four of the five Board members. *See* 5 U.S.C. §8472(g)(1)(C); S. Rep. 99-166, at 73, 1986 U.S.C.C.A.N. at 1478.

B. The District Court's Decision Undermines The Congressional Scheme

The district court held that only the DOJ, not the Fund's Executive Director, could authorize litigation of the Fund's claims in this case. By giving the

DOJ exclusive litigation authority over the Fund, the court below acted with complete disregard for Congress' intent to shield the Fund from politics.

As noted above, one of Congress' main concerns in designing FERSA was that the Fund's Board, composed of Presidential appointees, might be susceptible to political pressure from the Administration. To prevent such potential indirect political influence on the Fund's administration, Congress limited the Board's role to general policymaking and oversight, while granting the Executive Director authority over day-to-day administration.

While Congress carefully sought to shield the Fund from *potential indirect* political influence over Fund administration, the decision of the court below permits *actual and direct* political control. Congress limited the role of the Fund's Board out of concern that, as presidential appointees, the members of the Board *might* be susceptible to political influence. By comparison, there is no question that the DOJ, which acts at the direction of the Administration, *is* subject to the political influence of the President.

Moreover, while Congress deliberately kept the Fund's Board out of day-to-day administrative decisions of the Fund, the opinion of the court below allows the DOJ the *exclusive* right to make a critical administrative decision: whether to litigate a legal claim worth tens of millions of dollars.

The district court's ruling also ignores the efforts Congress went to to ensure that decisions concerning the Fund be made only in the interest of the Fund's participants. Congress structured FERSA so that those who exercise "discretionary authority or discretionary control over the management or disposition of the assets" of the Fund are deemed to be Fund fiduciaries. *See* 5 U.S.C. §8477(a)(3)(C). It imposed a legal obligation on these fiduciaries to discharge their "responsibilities with respect to the Thrift Savings Fund ... solely in the interest of the participants and beneficiaries." 5 U.S.C. §8477(b)(1).

To give the DOJ exclusive control over litigation of Fund legal claims is to ignore these fiduciary strictures. By deciding whether to litigate (or settle) a legal claim to recover millions of dollars in lost Fund money, the DOJ will be exercising discretionary control over assets of the Fund. However, by its own admission, the DOJ will consider "interests other than those of the Fund" when deciding whether to litigate the Fund's legal claims. *See* Nov. 28, 2001 Supplemental Notice of United States' Position, at J.A. 351. It will pursue the interests of the "'United States as a whole, *as articulated by the Executive*.'" *Id*. (citation omitted) (emphasis added). In other words, the DOJ will follow the political dictates of the Administration, not solely the interests of the Fund participants and beneficiaries, when deciding the fate of the Fund's legal claim.

Congress built a carefully constructed dike to keep the Fund safe from the political waters that surround it. The district court lets those waters pour in. The decision should be reversed.

II. SINCE THE MONEY AT STAKE IN THE LAWSUIT BELONGS TO THE FUND'S PARTICIPANTS, ONLY A TRUSTEE OF THE FUND SHOULD HAVE LITIGATION AUTHORITY

The Fund is not simply another government program funded by money from the U.S. treasury. It is an employee savings plan, similar to a private-sector 401(k) plan. It is financed by employee contributions and matching employer contributions. *See* S. Rep. 99-166, at 48, 1986 U.S.C.C.A.N. at 1453. The pot of money in the Fund consists of these employee and employer contributions, increased or decreased by investment performance and less any payments made for Fund expenses. *See* 5 U.S.C. §8437(b); S. Rep. 99-166, at 52, 1986 U.S.C.C.A.N. at 1457.

Unlike a defined benefit pension plan, in which the employer simply promises the employee future benefits, an employee savings plan is a plan in which "the employees own the money." Conf. Rep. No. 99-606, at 137, 1986 U.S.C.C.A.N. at 1520. As the conference report explained:

> The money, in essence, is held in trust for the employee and managed and invested on the employee's behalf until the employee is eligible to receive it. This arrangement confers upon the employee *property and other legal rights to the contributions and their earnings.* Whether the

> money is invested in Government or private securities is immaterial with respect to employee ownership. The *employee owns it*, and it cannot be tampered with by any entity including Congress.

Id. (emphasis added); *see also Sen. Hearings* at 115 ("In a thrift plan ... the employee owns the assets") (testimony of Jon Fossel, senior vice president and director, Alliance Capital Mgmt. Corp.); *Oct. 1985 House Hearings*, at 244 ("The funds would belong ... to the employee ....") (statement of L.J. Andolsek, president, Nat'l Ass'n of Retired Fed. Employees); 131 Cong. Rec. S15033 (daily ed. Nov. 7, 1985) (statement of Sen. Eagleton) ("If the employee leaves Government, he takes *his savings*, plus *his* Government match, with him.") (emphasis added).

When the Fund paid AMS to develop a new record keeping system, the money paid was money that belonged to the Fund participants. Similarly, any money recovered from AMS would go back into the Fund and belong to the Fund's participants.

Simply put, it is wrong to give the DOJ exclusive control over litigation of the claim because the money at stake is not the government's, but the participating employees'. Accordingly, political actors like the DOJ should have no say, let alone exclusive say, in determining whether the Fund should assert a claim to recover money belonging to the participants.

The conference report from FERSA's legislative history makes clear Congress' view that Fund assets "cannot be tampered with by any entity." Conf.

Rep. 99-606, at 137, 1986 U.S.C.C.A.N. at 1520. Giving the DOJ exclusive litigation authority allows the government not just to tamper with, but effectively to extinguish, a multimillion dollar legal claim belonging to the Fund. Accordingly, the decision below contravenes congressional intent.

III. AS A MATTER OF LAW, THE EXECUTIVE DIRECTOR, WHO SERVES AS TRUSTEE FOR THE FUND, HAS INDEPENDENT LITIGATING AUTHORITY

In holding that the Executive Director lacks independent litigating authority, the court below erroneously relied on 28 U.S.C. §516. That statute generally gives the DOJ litigation authority over federal agencies but it does not apply where, as here, the agency's own litigation authority is "otherwise authorized by law." 28 U.S.C. §516. FERSA broadly authorizes the Executive Director to take all "actions as are appropriate to carry out" his day-to-day management of the Fund. 5 U.S.C. §8474(c)(9). Established trust law makes clear that this authority includes the authority of the Executive Director, as Fund trustee, to sue on the Fund's behalf. *See Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 494 U.S. 558, 567 (1990) (noting common rule that "trustee has the exclusive authority to sue third parties who injure the beneficiaries' interest in the trust .... The trustee then has the sole responsibility for determining whether to settle, arbitrate, or otherwise dispose of the claim."); *see, e.g.*, *LeBlanc v. Cahill*, 153 F.3d 134, 146-48 (4th Cir. 1998) (allowing ERISA trustees to bring common law claim on trust's behalf); *see also*

Fed. R. Civ. P. 17(a) (providing litigation authority for "trustee of an express trust").

But perhaps most import in determining whether 28 U.S.C. §516 divests the Executive Director of litigation authority is Congress' clear desire that the Fund's administration be insulated from political influence. For example, in holding that the Postal Service has certain independent litigating authority, this Court explained in *Mail Order Association v. United States Postal Service*, 986 F.2d 509 (D.C. Cir. 1993), that:

> The DOJ's reliance on §§ 516 and 519, which were not persuasive as a matter of statutory construction, are even less convincing when considered *in light of Congress' unequivocal intent gleaned from the legislative history to free the Postal Service both from political control* and from the operation of "laws which in most instances apply to Government agencies and functions." Respect for the language of the Postal Reorganization Act and its underlying purposes simply will not permit the conclusion that Congress intended simultaneously to give the Postal Service such broad and unfettered discretion and to condition its judicial review options on the Department of Justice's – or even the President's – approval.

Id. at 522 (emphasis added). Similarly here, respect for FERSA and its underlying purposes will not permit the conclusion that Congress, while shielding the Fund's administration from political control, also intended to let the DOJ determine the fate of Fund assets, including legal claims. Any understanding of this legislative intent precludes the conclusion reached by the court below.

Finally, to the extent that 28 U.S.C. §516 and FERSA conflict, FERSA prevails. Not only is FERSA more recently enacted (FERSA dates from 1986 while Section 516 dates from 1966), but it specifically governs the powers of the Fund's Executive Director, while Section 516 just applies to federal agencies generally. *See Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1258, 1278 (1st Cir. 1987) ("the most recent and more specific congressional pronouncement will prevail over a prior, more generalized statute"); *see also UAW v. Auto Glass Employees Fed. Credit Union*, 72 F.3d 1243, 1248-49 (6th Cir. 1996); *Cheffer v. Reno*, 55 F.3d 1517, 1522 n.10 (11th Cir. 1995) ("Normally, where there is a conflict between an earlier statute and a later enactment, the later statute governs.")

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

November 5, 2002

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I hereby certify that I served two true copies of the foregoing Brief of Amici Curiae for Appellant this 31st day of October 2002, by U.S. Express Mail, postage prepaid, upon:

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ADDENDUM OF STATUTES

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